



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Lisa Howard
PO Box 200
Farmington, NH 03835

Re: 735 Ten Road Road
Tax Map

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 02-034**

OCTOBER 10, 2002

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to Lisa Howard pursuant to RSA 482-A and Env-C 614. The Division is proposing that a fine of \$11,500 be imposed against you for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH 03301.
2. Lisa Howard is an individual having a mailing address of P.O. Box 200, Farmington, NH 03835.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIM(S)

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Lisa Howard is the owner of land located at the corner of Chipmunk Lane and Blueberry Drive in Farmington, New Hampshire more particularly described on Town of Farmington Tax Map R-44 ("Map R-44") as Lot 11 ("the Property").
4. Everett Howard, husband of Lisa Howard, has acted on behalf of Lisa Howard in dealing with DES personnel about issues relating to the Property.
5. Blueberry Drive has drainage ditches that run along the eastern side of the road that allow road runoff to flow off the road, and prevent the road from flooding. Chipmunk Lane intersects Blueberry Drive at a "T" and runs east from Blueberry Drive.

6. An intermittent stream flows northwesterly through a set of double culverts under Chipmunk Lane, cuts across the corner of the Property, and flows westerly through a culvert under Blueberry Drive. The stream is depicted on Map R-44.
7. On July 26, 2001, DES received a complaint of wetlands violations on the Property that had occurred on or about July 19, 2001.
8. On August 14, 2001, DES personnel inspected the Property and found the following:
 - a) Approximately 1,728 square feet of the stream and associated wetlands at the corner of Chipmunk Lane and Blueberry Drive on the Property was filled;
 - b) Approximately 1,046 square feet of two drainage ditches running adjacent to or on the Property were filled;
 - c) A pond measuring approximately 2,500 square feet on the Property was excavated in a wetland area
9. On September 6, 2001, DES issued a Letter of Deficiency to Lisa Howard requesting that she remove 3 areas of fill placed in wetlands 1-3 (546 sq.ft., 500 sq.ft., 1,728 sq.ft.) within fifteen days.
10. On October 3, 2001, Mark West, a certified wetland scientist doing business as West Environmental and having a mailing address of 122 Mast Road, Suite 6, Lee, NH 03824, contacted DES and indicated he had been retained as Ms. Howard's consultant in this matter.
11. Subsequent field inspection by DES personnel including test pits by Mr. West confirmed that the 546 square feet of fill along Blueberry Drive, and the 1,728 square feet of fill at the corner of Blueberry Drive and Chipmunk Lane, was placed within DES's jurisdiction. Based on his inspection, Mr. West disputed that 500 square feet of fill along Blueberry Drive was within DES's jurisdiction.
12. On October 17, 2001, DES personnel inspected the Property accompanied by Mr. West and the Howards. During the inspection, Mr. Howard acknowledged that he had filled the vegetated drainage ditches and had excavated the pond.
13. On November 29, 2001, DES personnel again inspected the Property and staked out a proposed restoration area at the intersection of Blueberry Drive and Chipmunk Lane. At that time, Mr. Howard agreed to have plans developed by an engineer for the restoration area by the end of December, 2001. He further agreed to remove 546 square feet of fill from in front of the culvert along Blueberry Drive on the Property and to submit an after-the-fact application for the excavated pond on the Property.
14. On January 3, DES wrote a letter to the Howards' attorney, Francis X. Bruton, requesting the promised plans.

15. On January 18, DES personnel phoned Mr. Bruton regarding DES's expectations in the January 3rd letter. Mr. Bruton stated that he would communicate those expectations to Mr. Howard.

16. On February 11, 2002, DES Wetlands Bureau personnel spoke with Mr. Howard on the phone. At that time, Mr. Howard indicated that he was unwilling to move forward with the proposed restoration plan. Mr. Howard proposed an alternative plan that involved crossing the intersection of Chipmunk Lane and Blueberry Drive adjacent to the Property with a long culvert that would cut diagonally northwest across the intersection.

17. Blueberry Drive and Chipmunk Lane are private roads owned and maintained by the Yonder Plateau, Inc. Property Owners Association ("YPPOA"). The YPPOA is unwilling to allow the proposed culvert construction on their property.

18. On March 6, 2002, DES received photos from an abutter indicating additional work has been done outside of DES's jurisdiction, consisting of a shallow ditch dug at the edge of Blueberry Drive in an attempt to divert runoff along the road.

19. On April 1, 2002 DES issued Administrative Order No. WD 2002-14 (the "Order"), requiring Lisa Howard to:

- a) remove the approximately 1,728 square feet of fill blocking the stream at the intersection of Blueberry Drive and Chipmunk Lane on the Property;
- b) remove 546 square feet of fill and allow water to flow through the culvert from the northerly ditch on Blueberry Drive on the Property;
- c) submit restoration plans for the 2,500 square foot pond on the Property to restore it to its original condition;
- d) retain a qualified wetland scientist to supervise the implementation of the restoration plan and to submit the restoration progress reports; and
- e) implement the restoration plan only after receiving written approval and as conditioned by DES.

20. On May 8, 2002 DES sent a letter to Ms. Howard explaining that the deadline for appeal of the Order had passed and that administrative fines could be imposed per day for non-compliance. The letter concluded by asking for information regarding compliance with the Order.

21. On June 10, 2002 DES personnel received an email including photographs from an abutter documenting that no actions had been taken on the Property to comply with the Administrative Order.

22. The Division has not received a restoration plan from a certified wetland scientist retained by Ms. Howard. Further, the 546 square feet of fill blocking the northern culvert adjacent to Blueberry Drive, and the 1,728 square feet of fill at the corner of Blueberry Drive and Chipmunk

Lane has not been removed.

23. RSA 482-A:3, I states that no person shall excavate, remove, fill, dredge, or construct any structures in or on any bank, flat, marsh, or swamp in or adjacent to the waters of the state without a permit from DES.

24. RSA 482-A: 14, III states in part that failure, neglect or refusal to comply with this chapter or rules adopted under this chapter, or an order or condition of a permit issued under this chapter, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by this chapter shall be deemed violations of this chapter.

25. Env-C 614.02(a) defines a Class I Violation in part as unauthorized dredge, removal, or excavation that involves a total impact of 3,000 square feet or less in a non-tidal swamp or wet meadow that does not involve draining of wetland for lot development, with disturbance to no more than 5 percent of the area of impacted wetlands.

26. Env-C 614.02(b) defines a Class I Violation in part as unauthorized fill that involves a total impact of 3,000 square feet or less in a non-tidal swamp or wet meadow that does not involve fill for lot development, with disturbance no more than 5 percent of the area of impacted wetlands.

27. Env-C 614.06(e) defines Extraordinary Violations in part as failing to comply with an order issued pursuant to RSA 482-A:6.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Ms. Howard has violated RSA 482-A:3, I by placing fill in two locations; approximately 1,728 square feet at the corner of Blueberry Drive and Chipmunk Lane, and approximately 546 square feet of fill in front of a culvert along Blueberry Drive. Pursuant to Env-C 614.02(b)(1), DES is seeking a fine of \$500 for each instance of fill, totaling \$1,000 for these violations.

2. Ms. Howard has violated RSA 482-A: 3, I by dredging approximately 2,500 square feet of wetlands to create a pond without a permit from DES. Pursuant to Env-C 614.02(a)(1) DES is seeking a fine of \$500 for this violation.

3. Ms. Howard has violated RSA 484-A:14, III by failing to comply with items E.1, E.2, E.3, E.4, and E.5 of Administrative Order No. WD 2002-14 by not removing approximately 1,728 square feet of fill, by not removing 546 square feet of fill, by failing to submit a restoration plan for the 2,500 square foot pond, by not retaining a certified wetland scientist, and by failing to implement the restoration plan in accordance with a DES restoration approval letter. For these violations, pursuant to Env-C 614.06(e), DES is seeking a fine of \$2,000 for each violation, for a total fine of \$10,000.

The total fine being sought is \$11,500.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than November 11, 2002, using the enclosed form as follows:

If you plan to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to the DES Legal Unit, at the address as noted on the form.

2. If you choose to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If you wish to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If you wish to have a hearing but are unable to send an authorized representative to the hearing as scheduled, you must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If you do not notify the DES Legal Unit in advance and do not have an authorized representative attend the hearing, the hearing will be conducted anyway in accordance with Env-C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violation(s) and that the amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine(s) sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:

The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.

2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.

3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

IMPORTANT NOTICE

An administrative fine hearing that is scheduled is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

* * * * *

Information regarding this proposed fine may be made available to the public via DES's Web page (www.state.nh.us/des). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.


COPY
Harry T. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO 2002)

cc: Gretchen Rule, Administrator, DES Legal Unit
Mark Harbaugh, DES Enforcement Attorney
Susan Alexant, DES Rules & Hearings Attorney
Marjory Swope, NHACC
Jennifer Patterson, Sr. Asst. Attorney General, EPB, N.H. Dept of Justice
Farmington Conservation Commission
Farmington Board of Selectmen

***** RETURN THIS PAGE ONLY *****

LISA HOWARD IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN NOVEMBER 11, 2002

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Lisa Howard.

I request to have a formal hearing scheduled in this matter.

I request to have a pre-hearing conference scheduled in this matter.

I would like to meet informally to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Lisa Howard.

I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$ paid to "Treasurer, State of New Hampshire" is enclosed.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

**Department of Environmental Services
Legal Unit
6 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095**

If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.